Supreme Court, U.S.
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No. 93-149

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROBERT D. FISH,

Petitioner,

vs.

JOAN MARIE COLLINGS, et al.,

Respondents.

OPPOSITION TO PETITION FOR CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents New Hampshire Insurance Company[1] and American International Adjustment Company, Inc.[2]

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1 New Hampshire Insurance Company is a corporation. Pursuant to Supreme Court Rule 29.1, the following is a list of parent companies and subsidiaries (except wholly owned subsidiaries): New Hampshire Insurance Company's parent companies are NHIG Holding Corp., American International Group, Inc. and C.V. Starr & Co., Inc. New Hampshire's subsidiaries that are not wholly owned include United Guaranty Corporation, AIG Europe, S.A., and Seesam International Insurance Company, Ltd.

2 American International Adjustment Company, Inc. is a corporation. Pursuant to Supreme Court Rule 29.1, the following is a list of parent companies and subsidiaries (except wholly owned subsidiaries): American International Adjustment Company Inc.'s parent companies are

respectfully request that the Petition for Writ of Certiorari of Robert D. Fish be denied.

INTRODUCTION

Petitioner has not shown that the issues resolved by the Fourth District Court of Appeal of the State of California in its unpublished opinion involve any conflict in the courts or involve important questions of law such that this Court should exercise its discretionary power of review.

The Petition merely echoes those issues and arguments already fully addressed by the California Court of Appeal in its written opinion, which was denied review by the California Supreme Court.

Despite petitioner's assertions to the contrary, no new or important federal issue is presented by his Petition to this Court. As such, the Petition should be denied.

American International Group, Inc. and C.V. Starr & Co., Inc. All subsidiaries of American International Adjustment Company, Inc. are wholly owned.

STATEMENT OF THE CASE

In an underlying state court action, respondents filed a complaint against petitioner for, among other things, fraud. Petitioner filed for bankruptcy, in part to discharge the claims that were the subject of respondents' state court action. Respondents filed an adversary proceeding in bankruptcy court, asserting that petitioner's filing was fraudulent. However, the bankruptcy court discharged petitioner's debts, whereupon respondents then dismissed the state court action.

Thereafter, petitioner instituted a new action against respondents alleging two claims of malicious prosecution. Petitioner asserted that the filing of both the state court fraud action and the adversary proceeding in bankruptcy were tortious. The claim regarding the bankruptcy proceeding was disposed of by way of respondents' demurrers. The claim regarding the state court action was disposed of by respondents' motions for summary judgment.

In its written opinion, the California Court of Appeal, Fourth Appellate District, affirmed the trial court's rulings. Subsequently, the California Supreme Court denied review. Petitioner then filed his Writ Petition in this Court.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition for a Writ of Certiorari to review the decision of the California Court of Appeal, and the subsequent denial of review by the California Supreme Court, because the petition does not present "special and important reasons" for the discretionary granting of review pursuant to Supreme Court Rule 10.

Under Supreme Court Rule 10.1(b) and (c), review may be granted when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals, or when a state court has decided an important question of federal law which has not been,

but should be, settled by the Supreme Court, or has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court.

As none of these situations is present in the instant case, review should be denied.

1. Petitioner's Preemption Argument Contradicts Well Settled California Law Defining And Construing The Common Law Elements Of A Cause Of Action For Malicious Prosecution. No Important Federal Question Is Presented By The Writ Petition.

According to California law, the common law tort of malicious prosecution lies where a defendant files a lawsuit that is initiated with malice and without probable cause, and results in a favorable termination for the plaintiff. Bertero v. National General Corp., 13 Cal.3d 43, 50 (1974).

Under California construction, the "favorable termination" must be based on the merits of the prior action. A termination is only favorable when it reflects the innocence or lack of culpability of the accused party. A dismissal on technical or procedural grounds is not a favorable termination. Warren v. Wasserman, Comden & Casselman, 220 Cal.App.3d 1297 (1990). Moreover, where the dismissal reflects ambiguously on the merits of the action, a favorable termination will not be recognized. Weaver v. Superior Court, 95 Cal.App.3d 166 (1979) (disapproved on other grounds in Sheldon Appeal Co. v. Albert & Oliker, 47 Cal.3d 863, 883, fn. 9 (1989).).

Here, in order to escape liability in respondents' state court action, petitioner sought to discharge respondents' claims against him in bankruptcy. Although respondents filed an adversary proceeding in the bankruptcy action, the subject debts were eventually discharged. With the discharge of these debts, respondents then dismissed their state action against petitioner. However, the resulting dismissal as a result of the

bankruptcy findings does not constitute a favorable termination on the merits such that petitioner's innocence was unambiguously demonstrated.[3]

The California appellate court refused to find that petitioner's circumvention of liability in respondents' original state court action (by virtue of the successful discharge and dismissal in bankruptcy) was a "favorable termination" such that he could pursue a claim for malicious prosecution against those who initially sued him. Petitioner's claim that a "spurious" standard was imposed on him in the courts below has no merit, for the record

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3 In fact, in the 1987 adversary bankruptcy proceeding, the court held respondents to a "clear and convincing" burden of proof instead of a "preponderance of the evidence" burden. This ruling was made prior to this Court's holding in Grogan v. Garner, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991), in which this Court ruled the "preponderance" burden was the proper standard of proof for dischargeability exceptions.

clearly shows that the appellate court found that petitioner's lack of culpability was not unambiguously demonstrated, and was therefore a technical or procedural victory at best.

Petitioner now requests this Court to interpret California law to determine whether his case for malicious prosecution should have remained viable. Petitioner fails to recognize that reinterpretation of state construction of state common law, when no important federal question is at stake, is not a viable ground for granting review pursuant to Supreme Court Rule 10. Therefore, the Petition should be denied.

2. Petitioner's Equal Protection Arguments Are Without Merit.

Petitioner argues that his equal protection rights were violated because the California appellate court allegedly purposefully and secretly failed to publish its opinion applying a different standard to him than to other

litigants prosecuting a cause of action for malicious prosecution.

As discussed above, the proper legal standard was applied. Moreover, the court is free to determine which cases it deems significant for publication, which, petitioner's paranoia aside, results in no violation of equal protection.

3. Petitioner's Due Process Arguments Regarding His *In Pro Per* Status Are Meritless. Furthermore, The Petition Misstates Both The Facts And The Law In The Underlying Action.

Petitioner argues that his due process rights were violated because he was allegedly prejudiced due to his *in propria persona* status.[4] Specifically, petitioner argues that

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[4] Petitioner fails to point out to this Court that he is a licensed California attorney as well as a registered patent

the California judiciary "railroaded" him out of the courts. This assertion, while untrue, has been raised by petitioner before. The California Court of Appeal found this argument to be without factual and legal support, and expressed this in its written opinion.[5] This Court should not spend unnecessary time giving further credence to petitioner's contentions, and the Petition should be denied.

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attorney who is currently practicing in Los Angeles with the firm of Lyon & Lyon.

[5] See Appendix 1 to Writ Petition, for the Court of Appeal's opinion, at pages 48-49, under heading D, wherein the court stated that Fish's claims of misconduct by the California judiciary were "based upon speculation without support in the record."

CONCLUSION

The Petition for Writ of Certiorari is petitioner's attempt to have a "fourth bite of the apple." Although petitioner may be unhappy with the adverse rulings taken against him by the California courts, no important federal issues are presented by the Petition.

Therefore, the Petition for Certiorari should be denied.

Respectfully submitted,

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James A. Murphy and MURTAUGH, MILLER, MEYER & NELSON, Attorneys for respondents New Hampshire Insurance Company and American International Adjustment Company, Inc.